93-153

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE ARNOLD,
a/k/a/ SAMAD AHMAD,
Petitioner,

v.

ROBERT (PETE) LEONARD,
et. al., and THE CITY OF
COLUMBUS, etc., et. al.,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the claim of a member of a class action suite be dismissed without affording that class member due process of law, where that class member's claim is dismissed without his knowledge or consent and without a written Order of court, in violation of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

The names of all parties to this case appear in the caption of the case.

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For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, **GEORGE ARNOLD,** respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit refusing to set aside the United States District Court for the Middle District of Georgia's Order denying class certification, denying Petitioner's Motion to Intervene and enforcing a settlement agreed upon between the City of Columbus and the "remaining" plaintiffs, when Petitioner was not allowed to intervene although his claim had been dismissed without his knowledge or consent and without a written Order of court.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is attached, and appears in Appendix 1a to this Petition. The unpublished written opinion of the District Court for the Middle District of Georgia appears in Appendix 2a to this Petition.

JURISDICTION OF THE COURT

The Court of Appeals' opinion in this matter was filed on *January 29, 1993*. A timely Petition for Rehearing and Suggestion of Rehearing En Banc was filed on February 22, 1993. The Court of Appeals' denial of the Petition for Rehearing and Suggestion of Rehearing En Banc was issued on April 7, 1993, and is set forth in Appendix 11a to this Petition. This Court's jurisdiction is invoked pursuant to *Title 28, U.S.C. § 1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in Appendix 12a to this Petition.

STATEMENT OF THE CASE

The United States District Court for the Middle District of Georgia had jurisdiction pursuant to *Title 28, U.S.C. § 1331*.

On June 18, 1971, the Petitioner and six other party plaintiffs, then police officers for the City of Columbus, Georgia, filed suit against the City of Columbus and various officials alleging violations of their First Amendment rights and racial discrimination on the part of the defendants. The lawsuit was originally commenced as a class action, and was filed in the United States District Court for the Middle District of Georgia. The suit alleged that the defendants had engaged in a pattern of racial discrimination in the operation of the police department for the

City Government of Columbus, Georgia. The plaintiffs further alleged that they were wrongfully discharged by the defendants and that they were entitled to reinstatement and back pay. The defendants filed an answer denying all allegations.

On January 16, 1975, a pre-trial conference was held, and the plaintiffs, at that time, had narrowed their claims to the dismissal of the seven police officers (including Petitioner). Of the original thirty-eight plaintiffs' which encompassed the entire class, only seven remained by the time the pre-trial conference was held. On the same date, a pre-trial Order was entered naming seven plaintiffs (including Petitioner) and setting the trial date for February 10, 1975.

On February 10, 1975, the date of the opening of the trial of this case, counsel for plaintiffs, Mr. Joel Gora, announced in open court that the claim of George Arnold (Petitioner here) was being withdraw, and the Court allowed Arnold's claim to be dismissed based solely upon that announcement. However, neither was a written Order of dismissal ever entered dismissing Arnold's claim, nor was Arnold ever notified by either the Court or Mr. Gora that his claim had been withdrawn. Further, prior to the date of the opening of the trial of the case, Mr. Arnold was never notified by Mr. Gora as to the actual trial date, nor did Arnold give Gora permission to withdraw his claim at that time or any other time.

After trial, the district court entered an opinion and judgment on April 17, 1975, holding that it did not have jurisdiction and dismissed the complaint. The Court of Appeals for the Fifth Circuit vacated the judgment of dismissal and remanded for a decision on the merits, and this Court denied certiorari. *Leonard v. Columbus*, 551 F.2d 974, 978 (5th Cir. 1977), *adhered to en banc* 565 F.2d 957 (5th Cir. 1978), *cert. denied* 443 U.S. 905 (1979).

The district court, on remand, again found against plaintiffs in an opinion and judgment dated February 23, 1982. On appeal, the Court of Appeals for the Eleventh Circuit reversed on the merits, holding that the dismissal of plaintiffs by the City of Columbus Police Department violated their right to freedom of speech protected by the First Amendment. This Court again denied certiorari. *Leonard v. Columbus*, 705 F.2d 1299, 1302 (11th Cir. 1983), *cert. denied* 468 U.S. 1204 (1984).

On remand, the parties engaged in extensive litigation concerning the nature of a remedy appropriate for the plaintiffs. After years of litigation and tedious discovery, the parties finally agreed to a proposed settlement on September 3, 1991. It was *only* at this time that George Arnold (Petitioner here) was informed that a settlement had been reached but that he was not being included in the proposed settlement. Arnold then sought the advice of an attorney, and on January 7, 1992, this counsel filed a Notice of Appearance on behalf of Petitioner.

After the Notice of Appearance was filed, the district court ordered all interested parties to appear on January 10, 1992 to participate in a hearing in an effort to clarify the issues before the Court. At the hearing on January 10, 1992, the district court denied class certification and also requested that the parties submit briefs for consideration of Arnold's motion to intervene (which Petitioner filed subsequent to the hearing on the class certification issue). After receiving post hearing briefs, the district court denied Arnold's motion to intervene and directed that the settlement reached between the parties be enforced, although Arnold testified at the hearing held January 10, 1992 that he was not aware that his claim had been withdrawn by his then attorney, Mr. Joel Gora, and that he had never given Gora permission to withdraw his claim at any time. Arnold further testified that nobody informed him that

his claim had been dismissed until he heard that a settlement had been reached by the parties and that he was not being included in the settlement.

On January 27, 1992, the district court entered an Order denying class certification, denying Petitioner's motion to intervene, and enforcing the settlement agreed upon by the parties. On January 29, 1992, the district court entered a judgment in favor of the six "remaining" plaintiffs against the defendants.

On February 24, 1992, Arnold filed a timely Notice of Appeal, and on January 12, 1993, oral argument was held. However, on January 29, 1993, the Eleventh Circuit Court of Appeals entered its opinion affirming the district court's Order.

On February 22, 1993, Arnold filed a Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied on April 7, 1993. Petitioner now appeals to this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit refusing to set aside the Order of the United States District Court for the Middle District of Georgia denying class certification, denying Petitioner's Motion to Intervene and enforcing a settlement agreed upon between the City of Columbus and the "remaining" plaintiffs, when Petitioner was not allowed to intervene although his claim had been dismissed without his knowledge or consent and without a written Order of Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because neither the district court nor the Court of Appeals acted in a manner (as referenced by their Opinions when considering the factual issues of this case) as to protect and preserve those rights guaranteed Petitioner by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Opinions by those courts conflict with previous decisions of this Court when considering whether or not one's due process rights under the Fourteenth Amendment have been violated.

This Court has, on numerous occasions, stressed the importance of individuals having access to the courts to seek redress for wrongs that have been wrought upon them by persons or other entities. The right to be heard is a right guaranteed to all citizens of the United States by way of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972), which many consider the "landmark" case in the area of procedural due process, this Court emphasized the importance of affording persons due process of law. This Court held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, *the right to some kind of prior hearing is paramount.*" *Id.* at 2705 (emphasis added). This Court went on further to hold:

> "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undetermined. It is a purpose of the constitutional right to a hearing to provide an

opportunity for a person to vindicate those claims." *Id.* at 2709.

In the case at bar, Petitioner certainly had a property interest encompassed by the Fourteenth Amendment to the United States Constitution. Petitioner was one of the original plaintiffs that brought a class action suit against the City of Columbus, Georgia, and various other officials. However, due to the fact that Petitioner's claim was withdrawn without his knowledge or consent and without written Order of court, Petitioner was deprived of his property interest without due process of law.

On February 10, 1975, the date of the opening of the trial of this case, counsel for plaintiffs (including this Petitioner), Mr. Joel Gora, announced in open court that the claim of George Arnold (the Petitioner here) was being withdrawn, and the district court allowed Arnold's claim to be dismissed based solely upon that announcement. The district court *failed to make any inquiry* as to the whereabouts of Petitioner or the reason why Petitioner's claim was being withdrawn. Also the district court never entered a written Order of dismissal and never notified Petitioner that his claim had been dismissed. Based upon the nature of the property interest at stake, the district court should have inquired into the reasons why Arnold's claim was being withdrawn, and Arnold's right to some kind of hearing prior to his claim actually being dismissed, was paramount.

In the area of procedural due process, notice and hearing, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. *Powell v. State of Alabama*, 287 U.S. 45, 53 S. Ct. 55, 64, 77 L.Ed 158 (1932). *Due process of law is the primary and indispensable foundation of individual freedom.* It is the basic and essential term in the social compact which defines the rights of the individual and delimits the

powers which the state may exercise. *Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 1439-40, 18 L.Ed.2d 527 (1967) (emphasis added). From the above-cited authority, it can be seen that this Court has placed much emphasis on the constitutional requirement of due process of law, and how important it is to protect the rights of individual citizens through the courts. Such rights should not be arbitrarily undetermined, as was done in the instant case, when the district court failed to make any inquiry into the facts and circumstances surrounding the proposed withdrawal of Petitioner's claim on February 10, 1975, and further failed to enter a written Order of dismissal which could have put Petitioner on notice that his claim had been dismissed.

On September 3, 1991, after years of litigation and tedious discovery, the parties agreed to a proposed settlement with a mediator. However, it was *only* at this time that George Arnold (the Petitioner here) was first informed that a settlement had been reached between the parties but that he was not being included in that settlement. Petitioner then sought the advice of an attorney, and on January 7, 1992, this counsel filed a Notice of Appearance on behalf of Petitioner. Subsequently, the district court ordered all interested parties to appear on January 10, 1992 to participate in a hearing in an effort to clarify all outstanding issues before the Court.

At the hearing on January 10, 1992, the district court denied class certification (although some 20 years had passed from the time the original plaintiffs had sought class certification) and also requested that the parties submit briefs for the Court's consideration of the Petitioner's motion to intervene (which Petitioner filed subsequent to the hearing on the class certification issue). After receiving post hearing briefs, the district court denied Petitioner's motion to intervene and directed that the settlement reached between the parties be enforced,

although Petitioner had testified at the January 10th hearing that he was not aware that his claim had been withdrawn by his then attorney Mr. Joel Gora, and that he had never given Gora permission to withdraw his claim at any time. Petitioner further testified that nobody ever informed him that his claim had been dismissed until he heard that a settlement had been reached by the parties and that he was not being included in the settlement. Nonetheless, on January 27, 1992, the district court entered an Order denying class certification, denying Petitioner's motion to intervene, and enforcing the settlement agreed upon by the parties. On January 29, 1992, the district court entered a judgment in favor of the six "remaining" plaintiffs against the defendants.

In *Boddie v. Connecticut*, 401 U.S. 371, 92 S. Ct. 780, 786, 28 L.Ed.2d 113 (1971), this Court clearly defined the minimum requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution by holding:

> "Although many controversies have raged about the cryptic and abstract words of the Due Process Clause,... there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed 865 (1950).

In the case at bar, at a minimum, Petitioner should have been afforded an opportunity to be heard prior to the deprivation by the district court of his property interest, due to the gravity of the property interest at stake. By his own testimony on January 10, 1992, Petitioner averred that at no time did he give his then attorney Mr. Joel Gora permission to withdraw

his claim, that he was, in fact, unaware that his claim had been withdrawn, that he was never notified as to when the trial (that was held February 10, 1975) was to begin, and that he was never notified by either Mr. Gora or the Court that his claim had been dismissed subsequent to the trial of the case. Under this factual scenario, it certainly cannot be said that Petitioner was afforded even the minimum requirements of due process as set-out by this Court in *Boddie*, supra. Petitioner was not given any notice or opportunity to be heard prior to the deprivation of his constitutional rights even though he had a great property interest subject to protection by the Fourteenth Amendment.

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or *unjustified deprivation* of life, liberty or property. *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042,1050, 55 L.Ed.2d 252 (1978) (emphasis added). The fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 1915, 68 L.Ed.2d 420 (1981), citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process, as this court often has said, is a flexible concept that varies with the particular situation. *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 984, 108 L.Ed.2d 100 (1990). In applying the above-cited authority to the facts of the instant case, it certainly cannot be said that the actions of the district court and the Court of Appeals met the fundamental requirements of due process, when Petitioner was not afforded an adequate opportunity to be heard at a meaningful time and in a meaningful manner. Due to the fact that the district court allowed Petitioner's claim to be withdrawn without conducting any inquiry as to the reason(s) why Petitioner's claim was being withdrawn, and with the Court of

Appeals presumably concurring in the district court's reluctance to inquire into the facts and circumstances of this case, those courts, in essence, were responsible for causing an *unjustified deprivation* of Petitioner's property interest without due process of law.

Additionally, because the lawsuit in question was originally filed as a class action, the district court should have determined whether it would issue class action status or certification as soon as practicable after the commencement of said action. F.R.Civ.P. 23(c) (1) states:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

The original plaintiffs (including this Petitioner) filed a class action suit against the City of Columbus, Georgia, and various officials, alleging violations of their First Amendment rights and racial discrimination on the part of the defendants, on June 18, 1971. The district court did not determine whether or not it would award class action certification until January 27, 1992, some 20 years later. Under the facts of this case, waiting to make a determination on whether or not to award class action certification for a period of 20 years, was in no way practicable or reasonable. The district court offered no reason for its delay in making this determination, and none would have been appropriate given this factual scenario.

In addition to waiting in excess of 20 years to make a determination as to whether or not it would award class action certification, the district court eventually denied class action certification and also denied Petitioner's motion to intervene pursuant to F.R.Civ.P. 24(c). Although Petitioner stated various reasons, at the January 10, 1992 hearing, why he should be allowed to intervene, the district court refused to adequately

consider those reasons to the prejudice of Petitioner. Petitioner argued that his claim had been dismissed on February 10, 1975 without his knowledge or consent and without a written Order of court. Petitioner argued that he had never given his then attorney Mr. Joel Gora permission to withdraw his claim, and was not aware that it had been actually withdrawn until he was informed that a settlement had been reached between the City of Columbus and the "remaining" plaintiffs, but that he would not be included in the settlement. Based upon these facts, the district court should have granted Petitioner's motion to intervene once it determined that Petitioner's due process rights had not been adequately protected in 1975, and once it determined that Petitioner had shown good cause why he should be allowed to intervene.

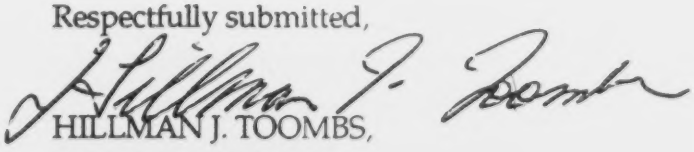
This Court should grant certiorari here in order to do what the United States District Court for the Middle District of Georgia and the United States Court of Appeals for the Eleventh Circuit failed to do; protect Petitioner's due process rights, guaranteed to him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated above, a writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 1, 1993.

Respectfully submitted,



HILLMAN J. TOOMBS,
Attorney for Petitioner

APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8197

D.C. Docket No. 71-CV-1514

ROBERT LEONARD, WILLIE L. PEARSON, VINSON WILLIS, JOHN CLARKE, GARY SMITH, FREDDIE WHITE	:	Plaintiffs-Appellees,
GEORGE ARNOLD, a/k/a/ SAMAD AHMAD	:	Movant-Appellant,
v.	:	
CITY OF COLUMBUS, GEORGIA, a consolidated municipal government, J. R. ALLEN, Mayor, A.J. McCLUNG, Mayor Pro Tem, JOSEPH W. SARGIS, Director of Public Safety, LEONARD LEAVELL, Member of Police Hearing Board, HUGH BENTLEY, Member of Police Hearing Board, B. F. McGUFFEY, Chief of Police, S. W. BROWN, Asst. Chief of Police,	:	Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Georgia

(January 29, 1993)

Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM: Affirmed. See 11th Cir. Rule 36-1.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et. al.,	:	
Plaintiff,	:	
v.	:	CIV. NO. 1514-COL
THE CITY OF COLUMBUS, et. al.,	:	
Defendants.	:	

ORDER

Pending before the court is a motion by George Arnold, a/k/a Abdul Samad Ahmad, to intervene in this case and be named as a party-plaintiff as allowed by Federal Rule of Civil Procdure 24(b) (2). A hearing was held on January 10, 1992, in Columbus, Georgia, at which Arnold was allowed to present evidence in support of his claim and the six persons presently named as plaintiffs were allowed to do the same in opposition. As a preliminary matter, the hearing also covered the question of class certification.

BACKGROUND

The prior history of this case, which was filed in 1971, is both long and complex, therefore this order will be concerned only with the facts as they relate to Arnold's claim and the question of class certification. After hearing the evidence, studying the demeanor of the witnesses and examining the post-hearing briefs, the court has concluded that all disputed facts must be resolved against Arnold.

Arnold was one of the seven original named plaintiffs in this case, who sued the city of Columbus after being fired from their jobs as police officers for removing the American flag from their uniforms as an act of protest. Robert Leonard was named as the lead plaintiff, and was given the duty of acting as a liaison between the plaintiffs and their counsel. The named plaintiffs, including Arnold, signed a document engaging attorney Margie Pitts Hames, and other lawyers she might choose, to represent them. Thirty others also joined the suit alleging racially discriminatory employment practices and class certification was sought. The claims of the thirty other plaintiffs were later dropped, although an order denying class certification was never issued.

In 1975, Hames notified Arnold of the upcoming trial in writing. Arnold called Hames and said that he wished to withdraw as a plaintiff, explaining that he had recently converted to Islam and his new religion prohibited him from taking part in the case. Although Hames attempted to change his mind, Arnold stated that he did not believe in "white man's justice." (Hearing Trans., p. 63). Hames sent no letter to Arnold confirming his decision, nor did she solicit one from him. Arnold also called Leonard and again stated his desire to withdraw from the case. Leonard met with Arnold and his brother the next day and unsuccessfully tried to change his mind. (Hearing Trans., pp. 77-78).

The case proceeded without Arnold. Attorney Joel Gora, the plaintiffs' trial counsel from the American Civil Liberties Union and who was connected with Hames through that organization, explicitly told the trial court that Arnold had withdrawn. Arnold knew of the trial, but made no inquiries as to why it was being conducted without him. (Hearing Trans., pp 47-48, 52-57). The trial court found against the plaintiffs, but

this decision was reversed on appeal. A second finding against the plaintiffs was also reversed on appeal. Each of these orders, on both the trial and the appellate levels, referred to only six plaintiffs as being in the case. Arnold and Leonard had occasional contacts as the years passed. (Hearing Trans., p. 79).

After the second reversal, the plaintiffs and the defendant reached a settlement. Arnold learned of the settlement and hired an attorney to help him try and intervene, but did not contact Hames. (Hearing Trans., pp. 94-96). A week before this month's hearing, Arnold spoke with Leonard. He said that he had been ill-advised by his minister and should not have withdrawn from the lawsuit. Arnold further stated that he intended to explain his situation to the court and hopefully would be reinstated as a plaintiff. (Hearing Trans., p. 80)

DISCUSSION

I. CLASS CERTIFICATION

The first matter to be resolved is the question of class certification. The court declared that the class claims had been abandoned during the hearing and incorporated two earlier orders from the previous trial court as exhibits, but will restate its reasoning in this order for the sake of clarity. There is no doubt that the class-based claims in this lawsuit were dropped at an early stage. All the parties and courts involved have acted on this fact, even though the trial court's permission to abandon the class allegations was never formally granted.

Federal Rule of Civil Procedure 23 (c) (1) requires a court to determine *by order* whether a case may be maintained as a class action as soon as possible after it is commenced. Rule 23 (e) states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise

shall be given to all members of the class in such manner as the court directs."

Since a formal determination under Ruler 23 (c) (1) was never made in this case, the question of whether Rule 23 (e) applies at all must be examined. One authority has stated that in the interim between when an action is filed and a decision regarding certification under Rule 23 (c) (1) is made, Rule 23 (e) controls and the class must be presumed to be proper for purposes of dismissal. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1797. This means that before a 23 (c) (1) notice is given any dismissal of the purported class action must meet the requirements of 23 (e). The purpose of this rule is to protect the unnamed members of the purported class and to make certain they are adequately represented by the named members, who may be tempted to settle their own claims and abandon the claims of the others. Court approval is needed for any settlement in a class action, *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 537 (S.D.Fla. 1988), a requirement that should also apply where the class is merely presumed to exist before a certification hearing.

In order to tie up this loose end, this court again denies class certification. More specifically, the court cures any defect caused by the lack of prior permission to abandon the class-based claims by finding that the class-based claims were clearly abandoned and that the claims of the named plaintiffs, arising primarily from the so-called "flag incident," were never sufficiently typical of those of the other purported class members to meet the requirements of Rule 23 (a). Since class certification has been denied, the parties do not need the permission of the court, as explained in Rule 23 (e), to settle this case.

II. ARNOLD'S CLAIM

Turning to the more important matter, it is clear that

Arnold's motion to intervene must be denied. The most obvious reason for this is that a client is bound by the actions of his attorney, even when taken without consultation with the client. *McNeal v. Wainwright*, 722 F.2d 674, 677 (11th Cir. 1984); *Callip v. Harris Co. Child Welfare Dept.*, 757 F.2d 1513, 1522 (5th Cir. 1985). When Gora represented to the trial court that Arnold had withdrawn, this had a binding effect on Arnold and precluded him from any further participation in the case. Also, this motion is in no way timely as required by Rule 24 (b) and would certainly prejudice the rights of the existing parties by delaying the termination of this litigation, which the plaintiffs have diligently pursued for many years.

Arnold's motion must also be denied on the merits. He denies ever having stated that he was withdrawing from the case or having authorized any attorney to drop him as a plaintiff. He claims that he relied exclusively on Leonard and the attorneys to keep him informed of the posture of the case and so *never once inquired about the status of the litigation during the sixteen years that passed between the trial and the settlement*. He claims that he and Leonard had no contact during that period.

This story is not credible. It is simply impossible to believe that if Arnold had remained as a plaintiff in the case he would not once have contacted somebody about the status of the litigation as the years went by, especially since he knew of the litigation and that he was not being included. The only logical and reasonable explanation for Arnold's absence during the trial and reappearance at the time of settlement is that he withdrew in 1975 and now wants back in to try and claim a share of the reward. Arnold's incredible explanation for his silence does nothing but bolster the credibility of Hames' and Leonard's explanations of why he withdrew and Leonard's story of the conversation he and Arnold had earlier this year.

As noted above, Arnold hired a new attorney, but did not contact Hames, when he learned of the settlement. This further disproves his claim. If Arnold really believed that he was still part of the original lawsuit, then he would first have talked with Hames instead of getting a new lawyer after hearing of the settlement. The only believable explanation for Arnold's behavior is that he had dismissed his claim in 1975 and knew that the attorneys involved in the case would not assist him in obtaining a portion of the settlement funds.

Furthermore, no reason has been shown as to why the six named plaintiffs and the attorneys would have conspired in 1975 to drop Arnold from the case without his knowledge. Such a plan would expose them to considerable risks for no benefit. Arnold's claim of some sort of present-day collusion among the plaintiffs and the defendant has no merit.

Arnold's remaining arguments are also meritless, as a few examples will show. His contention that trial counsel's dismissing him from the case violated Section I, Rule 15, of the Local Rules for the United States District Court for the Southern District of Georgia is obviously irrelevant since this is the Middle District of Georgia. The fact that the trial court did not issue a formal order dismissing him from the case is of no consequence, since the continuation of the trial without him was the practical and logical equivalent of an order and made manifest the court's acceptance of counsel's representation that Arnold had withdrawn as a plaintiff. Arnold's claim that the questions during the hearing about his religious conversion somehow violated his religious rights is clearly baseless, since the references to his religion and whether he gave it as a reason for withdrawing from the suit in no way infringed upon his right to worship as he chooses. Finally, Arnold's position is inherently inconsistent in that if he never withdrew as a plaintiff

in this case, as he claims, then why has he filed a motion to intervene? By definition, such a motion is made by a person who is not a party but is seeking to become one.

As a miscellaneous matter, the court must note that all through his post-hearing brief Arnold has implied that the named plaintiffs and the defendant have the burden of disproving his claim. This is incorrect. In a motion to intervene, the burden is on the potential intervenor to show why his motion should be granted. *S.E.C. v. Byers*, 109 F.R.D. 299, 301 n. 1 (W.D.Pa. 1985). Arnold has clearly failed to carry this burden.

CONCLUSION

Class certification is DENIED, to the extent that this has not been done already. Arnold's motion to intervene is also DENIED because he is bound by the actions of his attorney who represented him as having withdrawn, his motion fails to meet the requirements of Rule 24 (b) and the credible evidence shows that he voluntarily dismissed his claim in 1975. The court also orders that the terms of the settlement agreed upon by the parties, by which the six named plaintiffs and their attorney will receive $120,000.00 each for a total of $840,000.00 be enforced.

SO ORDERED, this _____ day of _____, 1992.

/S/_____

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

Judgment entered : January 29, 1992
For the Court : Gregory J. Leonard, Clerk

By: /S/_____
Helen F. Newberry
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et. al.,	:	
Plaintiff,	:	
v.	:	C.A. NO. 1514-COL
THE CITY OF COLUMBUS, et. al.,	:	
Defendants.	:	

JUDGMENT

Pursuant to the order of this Court dated and filed January 27, 1992, and for the reasons stated therein, JUDGMENT is hereby entered as follows:

(1) Denying class certification.

(2) Denying motion by movant George Arnold, a/k/a Samad Ahmad to intervene as a plaintiff.

(3) Enforcing the settlement agreed upon by the parties. The six named plaintiffs and their attorneys will receive $120,000.00 each for a total of $840,000.00.

This 29th day of January, 1992.

Judgment entered : January 29, 1992
For the Court : Gregory J. Leonard, Clerk

By: /S/
Helen F. Newberry
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 92-8197

ROBERT LEONARD, et. al.,	:	
	:	Plaintiffs-Appellees,
GEORGE ARNOLD a/k/a SAMAD AHMAD,	:	
	:	Movant-Appellant,
v.	:	
	:	
CITY OF COLUMBUS, et. al.,	:	
	:	Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

BEFORE: COX and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/
Joel F. Dubina
United States Circuit Judge

ORD-42
(9/91)

Amendment XIV. Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 93-153

AUG 31 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GEORGE ARNOLD
a/k/a SAMAD AHMAD,

Petitioner,

vs.

ROBERT (PETE) LEONARD, WILLIE L. PEARSON, JR., VINSON WILLIS, JOHN H. CLARKE, JR., GARY L. SMITH and FREDDIE L. WHITE,

and

THE CITY OF COLUMBUS, etc., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's motion to intervene after settlement was properly denied where petitioner was dismissed as a plaintiff prior to trial at his own request?

PARTIES TO THE PROCEEDINGS BELOW

The petition does not list the parties to the proceedings in the Court of Appeals. They were:

Petitioner: George Arnold, a/k/a Samad Ahmad, former plaintiff and appellant in the Court of Appeals;

Respondents: Robert (Pete) Leonard, John H. Clarke, Jr., Willie Pearson, Jr., Gary Smith, Freddie White, Jr., Vinson Willis (plaintiffs and appellees below);

Respondents: City of Columbus, Georgia and the following former and current officials of Columbus – J.R. Allen, former mayor, Hugh Bently and Leonard Leavell, former members of Police Hearing Board, S.W. Brown, former Assistant Chief of Police, A.J. McClung, former mayor pro-tem, B.F. McGuffey, former Chief of Police, Joseph W. Sargis, former Director of Public Safety, the current mayor, mayor pro-tem, chief of police, assistant chief of police, and director of public safety of the City of Columbus in their official capacities (defendants and appellees below).

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INTRODUCTION

The petition presents a claim by a former plaintiff who dropped out of this lawsuit in 1975 prior to trial that he has a right to re-enter the lawsuit by a motion to intervene in order to receive an equal share of a successful monetary settlement. The factual dispute below was whether petitioner George Arnold[1] directed his attorney to dismiss his claim. The district court found that he did instruct his attorney to dismiss his claim, that his testimony to the contrary was incredible and possibly perjurious, and that Arnold had no remaining legal interest in the lawsuit. The court of appeals affirmed without opinion.

STATEMENT OF FACTS

The facts stated in the petition are misleadingly incomplete. There are two major shortcomings. First, Arnold fails to mention that two witnesses, his former lawyer and a co-plaintiff, testified that Arnold informed them he wanted to withdraw from the case and that his withdrawal from the case was pursuant to his wishes, testimony credited by the district court. Second, Arnold does not mention that the district court found all the facts against him.

---

[1] Petitioner George Arnold also has the name Samad Ahmad. He will be referred to herein by the name his counsel used in the petition and as he identified himself at the evidentiary hearing, *i.e.*, Arnold.

1. The Factual Dispute, The Facts Found Against Petitioner, and Petitioner's Failure to Raise Any Issue for Review.

Shortly before trial in 1975 petitioner Arnold informed his then co-plaintiff Robert Leonard and his lawyer Margie Pitts Hames that he wished to withdraw from this lawsuit. At the opening of trial, trial counsel for plaintiffs, Joel Gora, informed the district court that Arnold was not going to pursue his claim and the court permitted the withdrawal of Arnold's claim. Transcript of February 10, 1975, p. 4.[2]

Nothing further was heard from Arnold for more than sixteen years until after the remaining parties had reached a settlement that the six plaintiffs who pursued their claims would each receive one hundred twenty thousand dollars. Arnold then surfaced but he did not contact plaintiffs' attorneys in an effort to participate in the settlement. Instead he retained separate counsel, but he and his counsel took no steps to re-enter the litigation until the district court set a hearing and ordered Arnold to appear and "If Mr. Arnold wishes to contend that he does have an interest remaining in this case, he should come prepared to present evidence of it." R3-46,[3] Order

---

[2] The complaint was filed by private counsel. Beginning in 1973, representation of plaintiffs was also provided by counsel from the American Civil Liberties Union.

[3] References are to the record volume and docket numbers assigned by the district court clerk. *E.g.*, "R3-46" refers to document number 46 of volume 3 of the record.

of December 31, 1991.[4] The court took testimony from Arnold, who claimed that he had not authorized the dismissal of his claim and that for sixteen years he was not informed about the status of the lawsuit and never inquired of anyone as to the status of the lawsuit. The district court found that Arnold told his former co-plaintiff Leonard and former lawyer Hames that he no longer wished to be a plaintiff due to his religious conversion. After the hearing Arnold filed a motion to intervene and after receiving briefs from Arnold and the parties on Arnold's status, the district court found "that all disputed facts must be resolved against Arnold," Petition, p. 6a, and that his testimony that he did not authorize his attorney to withdraw his claim "is not credible." *Id.* The court amended the conclusion to its order to add, in part, the following:

> As explained above, Mr. Arnold's motion to intervene has no basis whatsoever in either the law or the facts and appears to have been motivated chiefly by a desire to share in the settlement proceeds due to the more diligent named

---

[4] Arnold's factual recitation incorrectly states that he initiated steps to assert his claim, that his attorney filed a notice of appearance and the court thereafter scheduled a hearing. Petition, p. 8. The docket entries show that the court heard that there was a potential claimant, and after this person (Arnold) took no steps to assert his alleged interest for several months, entered an order on December 31, 1991 directing Arnold to appear; his attorney filed an appearance January 7, 1992.

Petitioner also states that he "was informed that a settlement had been reached but that he was not being included." Petition, pp. 4, 8 and 12. This incorrectly invites the inference that Arnold was being informed by the court or counsel of the resolution of the litigation as if he were still a party.

> plaintiffs. The court feels that a "reasonable inquiry" by Mr. Toombs [Arnold's current attorney] would have exposed this and made unnecessary the hearing at which his client quite possibly committed perjury. In considering this matter, the court has come very close to imposing sanctions on both Mr. Toombs and his client, but has decided to give them the benefit of the doubt.

R3-58, Order of January 30, 1992, appended hereto *infra*, p. 2a.

Although Arnold appealed the denial of his motion to intervene, he failed to contend that the findings of fact of the district court were clearly erroneous. Brief for Appellant, *Leonard v. City of Columbus*, 985 F.2d 579 (11th Cir. 1993). The court of appeals affirmed without opinion. Petition, 1a. In seeking review by this Court, Arnold likewise does not contend that the district court's fact finding was erroneous. The petition's statement of facts simply omits facts unfavorable to Arnold, fails to inform the Court that the underlying "facts" on which his argument is based were rejected by the courts below, and that contrary facts were found which entirely negate his argument that his due process rights were violated by the district court.

2. The Underlying Litigation and the Evidence from Petitioner's Due Process Hearing.

This case was initiated by 38 African-American police officers of Columbus, Georgia alleging violations of their first amendment rights and racial discrimination by the City of Columbus and various officials. Seven of the

officers, the six plaintiffs who are respondents here and petitioner Arnold, had been dismissed from the police department for removing an American flag patch from their uniforms. They challenged their dismissal on first amendment grounds, *inter alia*, and challenged various practices of the police department as racially discriminatory.

By the time of the pre-trial conference, plaintiffs had narrowed their claims to the dismissal of the seven officers. This is reflected in the pre-trial order of January 16, 1975 and the order of February 3, 1975. The pre-trial order set the trial date for February 10, 1975. R1-12A. At that time, Arnold was still a plaintiff and contrary to the assertion on the petition, p. 3, Arnold was notified of the trial date. Margie Pitts Hames, who has been one of plaintiffs' attorneys throughout this litigation, identified correspondence dated February 3, 1975 to Arnold and the other plaintiffs referring to the trial that would begin the next week. Plaintiffs' Exhibit 1.

Just before trial Arnold telephoned co-plaintiff Robert Leonard and informed Leonard "that he wanted to withdraw his name from the case because of his religious belief . . . " Transcript of January 10, 1992, p. 77 (hereafter "T.___"). Arnold told Leonard he had become a Muslim and that his religious advisor had counseled him that he was not allowed to participate in the judicial system and at that time he wanted to withdraw his name from the case. T. 77. Leonard met with Arnold and Arnold's brother the next day and asked Arnold not to withdraw. Arnold repeated his reasons for withdrawing –

> [H]e had changed his religious belief, he had changed his name and he just didn't believe in the white folk's justice anymore and he wanted to release his name – his name taken off.

T. 78. Leonard told Arnold to get in touch with plaintiffs' lawyer about withdrawing. *Id.* Arnold telephoned Hames:

> HAMES: In 1975, shortly before the trial of this case, I received a call from Mr. Arnold, telling me that he wanted to withdraw from the case, he would not be participating in the trial.
>
> . . .
>
> HAMES: I asked him not to withdraw from the case. We were anxious to present a united front in the case. However, he said that his religion prohibited him from participating in the case. And I at that time did not know he had converted to – had become a Muslim, and he explained that to me. And he said he did not believe in a white man's justice and that he did not want to participate in the case.

T. 62-63. The religious conversion as the reason for Arnold's withdrawal was confirmed the week before the 1992 evidentiary hearing when Arnold told Leonard

> that he had been ill advised by his Minister Rockmart [*sic*] and that he was going to just explain to the judge that he had been led wrong and had asked for his name to be taken off, when hopefully that he would consider him being reinstated on the case.

T. 80. At the opening of the 1975 trial Arnold's claim was withdrawn. The remaining six plaintiffs participated at trial and throughout this litigation.

The six plaintiffs were eventually successful in securing a final determination that their dismissal violated their first amendment rights and the case was returned to the district court "for a determination of the appropriate remedy." *Leonard v. Columbus*, 705 F.2d 1299, 1306 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).[5] On remand the parties engaged in extensive litigation concerning the elements of the remedy. Defendants sought to limit recovery to nominal damages, and both parties engaged in voluminous discovery. The district court, per Honorable Duross Fitzpatrick, entered three opinions narrowing the issues between the parties. R2-14, R3-35, R3-38. None of this mentioned or involved Arnold.

The district court directed the parties to participate in nonbinding mediation and on September 3, 1991 the six plaintiffs and defendants agreed to a settlement proposed by the mediator. Prior to the parties arranging for final settlement papers and payment of the agreed sums, Arnold or an attorney acting for him began making inquiries about participating in the settlement. R3-40 and R3-41. The district court ordered that Arnold appear at a hearing on January 10, 1992, affording him the opportunity to present any evidence he had that he had an

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[5] The district court, per Honorable J. Robert Elliott, originally abstained after trial, ruling it did not have jurisdiction. R1-18A. This was vacated and remanded, *Leonard v. Columbus*, 551 F.2d 974 (5th Cir. 1977), *adhered to en banc*, 565 F.2d 957 (5th Cir. 1978), *cert. denied*, 443 U.S. 905 (1979).

On remand the district court entered judgment for defendants. R1-31A. Plaintiffs, respondents here, appealed and the court of appeals reversed on the merits.

interest remaining in this case. R3-46, Order of December 31, 1991, p. 2.

His claim having been dismissed, Arnold neither appeared at trial nor participated in any of the legal proceedings from 1975 until January, 1992. At the January 10, 1992 hearing Arnold claimed he had not authorized his dismissal and sought to explain why, if he were still a plaintiff, he had not been heard from for sixteen years. Arnold said he relied upon Leonard, who served as liaison between counsel and plaintiffs, to keep him informed of the status of the litigation. T. 34, 35, 76, 81-2, 99. Arnold and the six plaintiffs knew each other since school days, T. 38, 76, and Arnold described Leonard as "a life long friend and spokesman for the seven Plaintiffs." Brief for Appellant, *supra*, p. 17. Arnold never asked Leonard about the lawsuit even when Arnold heard that the trial had been held without him. He made no inquiry nor did he claim, as he now does, that he had not been notified of the trial. T. 40, 41, 47, 48, 52-57. Arnold did not offer any reason his life long friend and his then attorneys would act against his wishes. Nor did he contend that the settlement reached between the six plaintiffs and the city defendants was in any way connected with the dismissal of Arnold's claim, or that plaintiffs gained some advantage or benefit by the dismissal of the claim.

3. Findings of the District Court.

The district court rejected Arnold's position on legal and factual grounds. The legal grounds were (1) that a client is bound by the actions of his attorney, Petition, p. 6a, and Arnold did not dispute that his attorney had

dismissed his claim; and (2) that Arnold's motion to intervene was untimely and would "prejudice the rights of the existing parties by delaying the termination of this litigation, which the plaintiffs have diligently pursued for many years." *Id.*

The factual grounds were that Arnold's testimony that he never authorized his attorneys to dismiss his claim, that he relied on the attorneys and Leonard to keep him informed even when he knew he was not included at the trial, and "*never once inquired about the status of the litigation during the sixteen years that passed between the trial and the settlement*" was "not credible." Petition, p. 6a (emphasis in original).

The court found:

> It is simply impossible to believe that if Arnold had remained as a plaintiff in the case he would not once have contacted somebody about the status of the litigation as the years went by, especially since he knew of the litigation and that he was not being included. The only logical and reasonable explanation for Arnold's absence during the trial and reappearance at the time of settlement is that he withdrew in 1975 and now wants back in to try and claim a share of the reward. Arnold's incredible explanation for his silence does nothing but bolster the credibility of Hames' and Leonard's explanations of why he withdrew and Leonard's story of the conversation he and Arnold had earlier this year.

Id. The court found that the fact that Arnold hired a new lawyer rather than first contacting plaintiffs' attorney when he heard of the settlement further disproved his

claim. "The only believable explanation for Arnold's behavior is that he had dismissed his claim in 1975 and knew that the attorneys involved in the case would not assist him in obtaining a portion of the settlement funds." Petition, p. 7a.

The court found that no reason had been shown as to why plaintiffs and their counsel would have conspired to drop Arnold from the case. "Such a plan would expose them to considerable risks for no benefit." Petition, p. 7a. And the court found that "[a]fter hearing the evidence, studying the demeanor of the witnesses and examining the post-hearing briefs, the court has concluded that all disputed facts must be resolved against Arnold." Petition, p. 2a. As noted above, the court filed an amended order in which it found that the motion to intervene "has no basis whatsoever in either the law or the facts," that Arnold "quite possibly committed perjury," and held that it came close to imposing sanctions on both the attorney and the client *sua sponte*. *Infra*, p. 2a.

4. Class Action Aspects.

The petition, including petitioner's question presented, makes several statements regarding this lawsuit being filed as a class action.[6] Petitioner presents no issue regarding the dismissal of the class action allegations,

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[6] The question presented as framed by petitioner does not include the information that he had been a plaintiff. It suggests that he was an unnamed class member, a stranger to the litigation whose legal claim was dismissed without due process, without his consent and without his knowledge.

and expressly took the position in the district court that he did not wish to revive the class action. T. 9, 12, 14-15. Arnold merely claimed, which was not in dispute, that he had been a member of the purported class. *Id.*

The complaint asserted a Rule 23(a) and (b)(2), F.R.Civ.P. class of black persons who were refused employment by the police department or disciplined, discharged, denied promotions or assignments because of race. The class allegations were terminated by the pre-trial order in 1975. Because no order stated whether the class was certified or not, the district court directed plaintiffs to show cause at the January 10, 1992 hearing why certification should not be denied "since the class-based claims were apparently either dismissed or abandoned in 1975 . . . " R3-46, Order of December 31, 1992, p. 1. Plaintiffs put on evidence that the class allegations were voluntarily withdrawn at the 1975 pre-trial hearing, T. 6-7, and the court formally denied class certification. Petition, p. 5a. Arnold did not appeal that order.

REASONS FOR DENYING THE WRIT

The petition presents no reason, issue or other consideration which merits review by this Court. Petitioner asks this Court to review a factual contention which he lost in two federal courts below. This Court routinely denies review of such petitions except under the most unusual circumstances. *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972). Petitioner presents his argument as if the record supports his view of the facts, completely choosing to disregard that all factual disputes were resolved

against him. *Cf. Blau v. Lehman*, 368 U.S. 403, 408 (1962) ("Petitioner apparently seeks to have us decide the questions presented as though he had proven the allegations of his complaint . . . "). Even if this Court sat to hear claims of erroneous fact finding, which it has repeatedly said it does not, *United States v. Johnston*, 268 U.S. 220, 227 (1925), review would not be warranted because petitioner failed to appeal the adverse findings of fact to the court of appeals. In that court, as here, he merely acted as if the facts had not been found against him. *Leonard v. City of Columbus*, U.S. Court of Appeals for the Eleventh Circuit, No. 92-8197, Brief for Appellant, *supra*. The failure to raise such claims below is reason to deny the writ. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court's rule of practice under which the Court is reluctant to disturb findings of fact concurred in by two lower federal courts, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Neil v. Biggers, supra*, is fully applicable here.

Petitioner accuses the two courts below of "causing an unjustified deprivation of Petitioner's property interest without due process of law" by their "reluctance to inquire into the facts and circumstances of this case," and argues "the district court refused to adequately consider" the reasons Petitioner should be allowed to intervene. Petition, pp. 11-12. None of this is borne out in this record. To the contrary, the district court provided petitioner a full evidentiary hearing to advance his version of events. The resulting finding that petitioner's testimony was incredible was done within the fullest provision of

due process. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et al.,	:	
Plaintiff,	:	
vs.	:	CIV. NO.
THE CITY OF COLUMBUS, et al.,	:	1514-COL
Defendants.	:	

ORDER

(Filed JAN 30 1992)

This court has just recently denied Mr. Arnold's motion to intervene in the pending settlement of this case and now feels compelled to direct some comments towards Mr. Arnold's attorney, Hillman Toombs, Esq. To that effect, the previous order is hereby AMENDED to add the following paragraphs to the conclusion:

> Although nothing stated herein should be construed as intended to affect Mr. Arnold's decision regarding a possible appeal of this order, the court must note that Mr. Arnold's case, as presented by Mr. Toombs, comes dangerously close to being considered frivolous. Federal Rule of Civil Procedure 11 states that an attorney's signature on a pleading signifies:
>
> > that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or

> reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

One could make a strong argument that Mr. Toombs' case, as it developed in the hearing and in the brief filed thereafter, in no way approaches this standard. As explained above, Mr. Arnold's motion to intervene has no basis whatsoever in either the law or the facts and appears to have been motivated chiefly by a desire to share in the settlement proceeds due to the more diligent named plaintiffs. The court feels that a "reasonable inquiry" by Mr. Toombs would have exposed this and made unnecessary the hearing at which his client quite possibly committed perjury. In considering this matter, the court has come very close to imposing sanctions on both Mr. Toombs and his client, but has decided to give them the benefit of the doubt.

SO ORDERED, this 29 day of January, 1992.

/s/ Duross Fitzpatrick
Duross Fitzpatrick, Judge
UNITED STATES
DISTRICT COURT

MEM\bb